IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 406 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

G S R T C

Versus

B ARUNCHANDRA & CO AND OTHERS

Appearance:

MR MD PANDYA for Petitioner

MR BHARAT J SHELAT for Respondent No. 1

NOTICE SERVED for Respondent No. 3, 4, 5

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 22/06/2001

CAV JUDGEMENT

The appellant-Gujarat State Road Transport Corporation, incorporated under the Road Transport Corporation Act, 1950, has preferred this First Appeal under Section 96 of the Code of Civil Procedure, 1908, challenging the judgement and decree dated 24th September, 1979 under which the learned judge of the City

Civil Court, Court No.12, dismissed the suit of the present appellant with cost.

2. The facts may be briefly stated as follows.

The appellant, a Corporation incorporated under the aforesaid Act of 1950, instituted a Civil Suit being Civil Suit No.1429 of 1975 for the recovery of Rs.11,625/- with interest at 6% per annum and cost of the suit from the respondents abovenamed. It may be stated at the outset that the first respondent is a registered partnership firm, whereas Respondent Nos.2,3,4 and 5 are shown as the partners of the said partnership firm, Respondent No.1.

The appellant instituted the aforesaid Civil Suit before the City Civil Court at Ahmedabad alleging that the appellant had issued an open tender No.STG/PUR/G/I/57/OT/71-72 which was due on 22nd February, 1972. By issuing the aforesaid tender the appellant (original plaintiff) invited offers for the supply of certain types of pipes being E.R.W.M.S. pipes. In fact, the tender contained requirements of four types of pipes of different sizes and different qualities. We are concerned with item No.2 viz. E.R.W.M.S. pipes having size of 15/16" X 14G quantity 4689 meters plus 15% expected increase which would mean to 7500 meters. We are not concerned with other types of pipes which were covered by the said tender.

While issuing the tender, certain conditions were laid down as stated in the tender itself. The rates of the goods were required to remain in force upto 21st June, 1972. The tender consisted of a covering letter, tender schedule, declaration to be signed by the tenderer, information required to be furnished alongwith the tender by the tenderer and terms and conditions governing the submission of the tender. All these papers were to constitute a contract between the parties when the tender was accepted.

It appears that alongwith other persons the present respondents also filled in tender and submitted their offers with respect to the disputed item No.2 of the tender. The rate shown was at Rs.3.50 per meter. The Tender and Stores Committee of the appellant (original plaintiff) finalized the purchase of the said item by Resolution No.2456 on 20th April, 1972. Under the said resolution the tender of the present respondents with respect to the aforesaid item No.2 was accepted by the appellant (original plaintiff). The communication

was made to the respondents vide letter dated 21st April, 1972 stating that the tender of the respondents was accepted by the appellant. Therefore, according to the case of the appellant, the contract was concluded by the aforesaid acceptance letter dated 21th April, 1972 issued by the appellant to the respondents.

On receiving the aforesaid acceptance letter dated 21th April, 1972 the respondents took certain objections. One of the objections was that there was a mistake on part of the respondents in quoting the rate at Rs.3.50 per meter which was actually meant to be at Rs.3.50 per foot. There were other objections also but the appellant did not accept these objections and insisted on supply of the said item to the appellant at Rs.3.50 per meter. The appellant also issued notice to the respondents stating that if the respondents did not supply the said item at the quoted rate then the appellant would be constrained to purchase the said item from the open market and appellant would be put to some loss and the respondents would responsible and liable for the said loss. Despite the said notice, the respondents did not supply the said item to the appellant at the quoted rates. Therefore, according to the case of the appellant, they purchased the said item from the open market and, therefore, the appellant were put to loss at Rs.11,325/- being the difference of price of the said item quoted by the respondents in the tender and the rates at which the appellant was required to purchase the said item from the open market. The respondents were required to pay the said amount of Rs.11,325/- to the appellant. But the respondents did not pay the said amount to the appellant and again took certain objections. Therefore, the appellant instituted the aforesaid suit for the recovery of the said amount from the respondents.

3. Respondent Nos.1 & 2 filed written statement at exh.21 and the remaining respondents had adopted the said written statement by filing an application to that effect at exh.22. The suit was contested by all the respondents on the several contentions. The respondents contended that the suit was filed with a mala fide intention. That the suit was premature. That the Court had no jurisdiction to deal with the suit in question. That the suit was bad for misjoinder of parties and nonjoinder of necessary parties. The respondents also contended that there was not concluded contract between the parties. That there was a bonafide error and mistake on the part of the respondents in quoting the rate of Rs.3.50 per meter which actually meant Rs.3.50 per foot. That the

respondents came to know about the said mistake, therefore, they immediately addressed a letter dated 07/3/1972 clarifying that there was an error on their part as aforesaid. That the appellant had not suffered any loss. Even if the appellant had suffered any loss, according to the case of the respondents, the respondents were not responsible or liable for the same. In view of the above contentions the respondents claimed that the suit may be dismissed with costs of the respondents.

4. On the aforesaid pleadings, the learned trial Judge framed necessary issues at exh. 27.

After recording evidence and hearing arguments, the learned trial Judge came to the decision that the Court had jurisdiction to entertain the Suit. That the suit was not bad for misjoinder or for nonjoinder of necessary parties. The trial Court found that the tender of the respondents was accepted, however, the trial Court found that there was no concluded contract between the parties. The trial Court also found that the appellant had failed to prove that there was genuine mistake in quoting the rate at Rs.3.50 per meter instead of at Rs.3.50 per foot. The trial Court also found that the respondents had failed to prove that they had addressed a letter to the appellant dated 07/3/1972 clarifying the aforesaid error said to have been committed by them. The trial Court also found that the appellant had proved that they incurred extra expenditure of Rs.11,325/-. However, the trial Court found that the appellant was not entitled to Rs.300/- as Sales Tax amount.

5. On the aforesaid findings, the trial Court found that the appellant was not entitled to recover any amount and consequently, dismissed the suit with costs of the respondents.

6. Feeling aggrieved by the said judgement and decree of the trial Court, the appellant has filed this appeal before this Court. It has been mainly contended that the trial Court has erred in holding that there was no concluded contract between the parties. That the trial Court had not properly appreciated the evidence produced before it by the parties. That the trial Court has erred in not appreciating the difference between what constituted an essential condition or term of contract and what amounted to a mere expression of a desire of the parties as to the manner in which an agreed transaction is to go through. That the trial Court has materially erred in holding that the appellant was not entitled to recover Rs.11,625/from the respondents. It is the say of

the appellant that the judgement and decree of the trial Court are illegal and erroneous and deserve to be set aside. The appellant has, therefore, prayed that the present appeal be allowed, the judgement and decree of the trial Court be set aside and the suit of the appellant be decreed in terms of reliefs as claimed in the plaint.

7. On receiving the aforesaid appeal it was admitted at the relevant point of time, notice was issued to and served upon the respondents. Mr.Udayan P. Vyas appeared for Mr.Shelat on behalf of respondent No.1. I have heard the learned advocates for the parties and have perused the papers.

8. Now, the initial facts are not in dispute. The appellant had issued a tender and had invited offers from the tenderer for the supply of four different types of pipes. It is also undisputed that the respondents had filled in tender and at item No.2, the rates were shown at Rs.3.50 per meter. It is undisputed that the appellant had accepted the tender of the respondents and, therefore, according to the case of the appellant, the respondents were required to supply the said item at the quoted rates. These facts are not in dispute.

9. At the same time the trial Court has already found that the Court had jurisdiction to entertain the suit and the suit was not bad for misjoinder or nonjoinder of necessary parties. The trial Court has also found that the appellant had accepted the tender of the respondents and that the appellant had failed in proving that there was a mistake committed by them in quoting the rate at Rs.3.50 per meter instead of Rs.3.50 per foot. The trial Court has also found that the respondents have failed in proving that they had addressed a letter dated 07/3/1972 to the appellant clarifying the aforesaid error said to have been committed by them.

10. It would be relevant to consider here that the respondents have not contested the findings on issues recorded by the trial Court against them. In above view of the matter we are mainly concerned on the issue as to whether there was a concluded contract between the parties. The trial Court has held that there was no concluded contract between the parties.

11. Ms.Maya Desai, learned advocate appearing on behalf of the appellant for Mr.M.D.Pandya has argued the matter at a great length. She has taken me through the

judgement of the trial Court and the material evidence on record in order to argue that the aforesaid finding recorded by the trial Court is wrong and illegal and against the weight of evidence on record.

12. It has been first argued by Ms.Desai that since the trial Court has decided the first and the last parts of issue No.3 in favour of appellant, the trial Court was bound to pass a decree in favour of the appellant and against the respondents. It is difficult to agree with the said arguments of Ms.Desai. It has to be seen that the respondents have contested the issue with respect to concluded contract right from beginning. This is the middle part of issue No.3. The trial Court has considered this issue at a great length and after examining the cases of the rival parties, the trial Court had found that there was no concluded contract between the parties. Therefore, in my opinion, even if the first and the last parts of issue No.3 are decided in favour of the appellant, the appellant would still not be entitled to a decree in question so long as the middle part of the issue does not stand in favour of the appellant. Therefore, it would not be possible for this Court to pass a decree in respect of suit amount in favour of the appellant on this consideration. Here it is required to be considered the argument of Ms.Desai that when material terms and conditions with respect to a contract have not been in dispute and when those terms and conditions are acceptable to both the parties to the contract, then the contract must be treated to be a concluded contract, even if the agreed terms and conditions are not reduced into writing though the same were required to be reduced into writing. In other words, if the material terms and conditions are agreed upon between the parties then as per the argument, merely because they are not put on papers, it cannot be argued that the contract is not a concluded contract. Let us not dispute, in principle, the last argument of Ms.Desai.

13. It is also required to be kept in mind that a contract may be expressed or it may be implied. A contract may be in written or it may be an oral one. It may be partly written and partly an oral contract. There cannot be any definite way of entering into a contract that means that the terms and conditions of the contract must be finalized and both the parties must be aware of those terms and conditions of the contract. Each party must know as to what the party is required to perform and each party is also required to know as to what is being accepted from it. Unless this is done, it would not be possible for that party to perform its part of the

contract in question.

14. If we go through the judgement of the trial Court it would be very clear that the trial Court had dealt with this issue in para-wise at a very great length. On going through the reasons recorded by the trial Court I am in general agreement with the observations and reasonings recorded by the trial Court for arriving at the finding that there was no concluded contract between the parties. It would not be necessary for this Court to go through and elaborate discussions of each and every point separately which would ultimately be the repetition of what has been written by the trial Court in its judgement. Therefore, in the present case also it would not be necessary for this Court to go into detailed discussion on the aforesaid issue and without entering into detailed discussion, it can be held that the trial Court was fully justified in holding that there was no concluded contract between the parties.

15. However, when Ms.Desai has argued the matter at length, it would be appropriate to have some discussions on this issue as to whether or not there was a concluded contract between the parties.

16. Ms.Desai has argued that the terms and conditions were finalized and, therefore, they were simply required to be reduced into writing and that if they were not put on papers, it could not be said that there was not a concluded contract.

17. One would easily agree with the aforesaid submission in view of the earlier observations recorded by me that simply because the terms and conditions agreed between the parties have not been put on papers, it could not be said that there was no concluded contract between the parties.

18. Here the facts are little different. It is not a case that the agreed terms and conditions were simply not put on papers. There is something more then what has been argued by Ms.Desai during the course of her lengthy arguments.

19. The trial court has observed that there was a condition in the tender for the payment of earnest money and there is not dispute about the same. That the respondents have never paid any amount of earnest money at any point of time. It seems that the appellant, time and again, insisted upon payment of earnest money by the respondents. Despite the said insistence, the

respondents, at no point of time, have paid any amount as earnest money to the appellant. There is nothing on record to show that at any point of time the appellant or any officer thereof had dispensed with the deposit of earnest money by the respondents. The payment of earnest money was a part and parcel of the contract. In fact the tender contained a condition that each tender must be accompanied by a receipt of Rs.200/to be paid with the cashier at the Central Purchase, Ahmedabad as an earnest money deposit.

20. It is a matter of record that the respondents never paid the amount of earnest money. Therefore, it is an admitted position that there was a pre-condition for acceptance of tender that there should be payment of earnest money at Rs.200/- at the time of submission of tender. There is nothing on record to show that the appellant or any authorized officer, at any point of time, dispensed with the deposit of earnest money as said herein above. Therefore, this can be treated to be one of the circumstances for not holding the contract to be concluded contract, in absence of fulfilling a mandatory condition for payment of earnest money of Rs.200/- at relevant point of time.

21. It would be required to be considered here that the appellant insisted upon the deposit of earnest money and the respondents, despite the said insistence, did not deposit the earnest money amount which would be an additional factor in holding that there was no concluded contract between the parties.

22. The trial Court has also observed in para 8 of the judgement that the appellant had written a letter dated 2nd March, 1972 wherein the appellant stated that the respondents had not paid earnest money deposit and hence they should note that in term of the tender, the respondents' offer, without payment of earnest money, would stand ignored. This shows the importance of this condition of payment of earnest money deposit. This would further mean that the appellant did not consider this to be a condition which could be waived. The appellant also can be said to be of the view that this was a condition which ought to have been fulfilled by the respondents, meaning thereby that this condition was, even according to the appellant, mandatory and obligatory.

23. Further, the said letter also says that no exemption is granted to any firm under any circumstances as per the policy of the appellant-Corporation,

irrespective of the fact whether the respondents was registered with the D.G.S. & D. or granted exemption by any Government Department. Therefore, the respondents were required to make deposit of the said amount on or before 10/3/1972. Despite this position, the respondents did not make any payment of earnest money which shows that there was hesitation on part of the respondents in complying with the said condition of the tender. It is not shown that despite the said position, the contract should be treated to be a concluded one.

24. It seems that the aforesaid letter exh.56 of the appellant was replied by the respondents on 07/3/1972 which is at exh.39 on the record of the trial Court. There the respondents contended that the respondents were not agreeable to a condition about submission of Income Tax Clearance certificate therefore, the appellant was required to delete the said condition. The respondents also addressed, in the said letter, that the appellant should send another copy of declaration form if it was to be signed, as many of the terms were not agreeable to the respondents. This shows that the respondents were not agreeable to certain terms and conditions suggested by the appellant. The respondents further told the appellant in the aforesaid letter to go through the quoted letter carefully and reply to it. The respondents also asked the appellant, if the appellant agreed to the terms of the respondents. The respondents further told that so far as the payment is concerned the respondents wanted payment only through bank, 95% against the delivery and rest within 30 days. The respondents also made it clear in the letter that so far as penalty is concerned, the penalty is agreeable to the respondents to the extent of 2% per month. As regards earnest money the respondents made it clear that if the appellant felt that the terms of the respondents are agreeable to the appellant then only it would be useful to send earnest money.

25. The respondent, therefore, required the appellant to clarify as to whether or not the appellant is agreeable to the aforesaid terms and conditions suggested in the aforesaid letter dated 07/3/1972 placed at exh. 39 before the trial Court.

26. This means that certain conditions were suggested by the respondents which were required to be considered by the appellant and respondents were agreeable to the contract provided those terms and conditions were acceptable to the appellant. Therefore, the contract was again dependent on the acceptance or otherwise of the

aforesaid conditions suggested by the respondents in their letter. In other words the contract could not be considered to be a concluded one till these things were finalized.

27. The trial Court has observed that the appellant had addressed a letter to the respondents dated 21st March, 1972 placed at exh.40. This letter is in reply to the respondents' letter exh.39 referred to hereinabove. There the appellant made it clear in the said letter in reply at exh.40 that the terms as to payment were acceptable to the appellant. The relevant part of the said letter has been referred by the trial Court in its judgement which reads as follows.

> "Please refer to your quotation dated 16/2/1972 and our subsequent letter No.STG/PUR/GEN/OT/71-72/57/1/ 3484 dated 2/3/1972, on the above subject.
>
> It is requested to confirm that 1% discount offered for 95% payment against R.R. and balance within 30 days will be passed on to us for 100% payment to be made strictly within 30 days.
>
> It is also requested to accept our risk purchase clause as stipulated in column 12(C) of the questionnaire form.
>
> As the earnest money is must, you arrange to send Rs.200/- either by D.D. or by M.O. immediately."

28. The trial Court has also observed that thereafter another letter was issued by the appellant on 21st April, 1972 at exh.41 stating that their offer was accepted.

29. At the same time it is required to be considered that there is no reply to the suggestions made by the respondents in their letter referred to hereinabove. The respondents had already told the appellant that certain terms and conditions were not agreeable to them and, therefore, the appellant should send another copy of declaration to them so that it could be signed by the respondents. That would mean that the terms and conditions were not agreed between the parties till then. At the same time there was some doubt and dispute regarding terms and conditions and if those terms and conditions are not agreed upon between the parties it would not be possible to treat it to be a concluded

contract.

30. The trial Court has also observed that even by letter dated 16th February, 1972 at exh.37, certain suggestions were made by the respondents regarding certain terms and conditions with respect to mode of payment, time of delivery etc. In the quotation, the respondents have stated that the earnest money follows, but it never followed. In fact, looking to the aforesaid correspondence between the parties, the trial Court has found that the deposit of earnest money was part and parcel and the pre-condition of contract between the parties. Since the amount has not been paid at any point of time it would be one of the considerations for holding that there was no concluded contract between the parties. It is more so when the appellant never exempted the respondents from paying the earnest money nor such an exemption was permissible according to the policy of the appellant.

31. It is required to be considered that though the tender was required to be accompanied by an amount of earnest money and though the tender of the respondents did not deposit the amount of earnest money, then how the appellant issued the said tender of the respondents which was not accompanied by earnest money. Therefore, the trial Court has found that the payment of earnest money is a pre-condition for arriving at the contract. The said condition was not fulfilled at all. The trial Court has observed that the payment of earnest money has not been dispensed with and in absence of payment of earnest money, the contract could not be treated to be a concluded contract.

32. An attempt was made to show that even without payment of earnest money the contract could be said to be a concluded one. Now this is contrary to the documentary evidence on record. The appellant has stated in different letters addressed to the respondents, time and again, that the earnest money was a matter of policy and payment thereof could never be dispensed with as per the policy of appellant. Therefore, non-payment of earnest money could not be lightly treated. Moreover, the payment has never been dispensed with so far as earnest money is concerned. It is not understood as to how the tender was accepted in absence of payment of earnest money. It is more so when the payment of earnest money has not been, and could not be, under the policy of appellant, dispensed with.

33. As stated above, apart from the said position,

the respondents' letter dated 07/3/1972 at exh.39 further shows that certain terms and conditions suggested by the appellant were not agreeable and, therefore, the appellant should send another form for being signed by the respondents. Now it is not clear as to whether the appellant had sent another form and as to whether or not the respondents had signed the same. It is not clear as to what were the contents of the said form. It is not clear as to what terms and conditions were finally concluded between the parties. It is not clear as to which terms and conditions were not agreeable to the respondents.

34. As stated above, the appellant had mentioned certain conditions in his letter exh.40. There is noting on record to show as to whether or not the terms and conditions incorporated in the said letter exh.40 dated 21st March, 1972 addressed by the appellant to the respondents were in fact agreed between the parties or whether there were some suggestions or modification with respect to those terms and conditions. Unless the material terms have been agreed upon between the parties, the contract cannot be treated to be a conclude one.

35. Even on going through the oral evidence laid by the appellant, it is not possible to ascertain as to whether the condition of payment of earnest money was really dispensed with or it could be dispensed with by the appellant. The appellant has examined Jethalal Chhanalal Shah, as plaintiff witness No.1 at exh.28. He was Store Purchase Officer at relevant point of time. He has given details as to how the tender of respondents was accepted.

36. The appellant has also examined Chandrakant Manilal Contractor, at exh.58 as plaintiff witness No.2. He has given evidence to the effect that the appellant-Corporation had accepted the tender of the respondents as per his quotation with respect to item No.2.

37. In para 2 of his evidence, he has deposed that to accept the tender without earnest money is the discretion of the competent authority. Now it is a matter of record that the appellant has stated in its letter that it was the policy of the appellant to insist upon the payment of earnest money. It is also stated in its letter by the appellant that no exemption could be granted with respect to payment of earnest money. Despite the said position, the aforesaid witness has said in para 2 of his evidence that it is a discretionary matter. This oral evidence of this witness does not get corroboration from any other

material on record. There is nothing on record to show that a particular authority had discretion to dispense with the payment of earnest money. There is nothing on record to show that the said competent authority had in fact dispensed with the deposit of earnest money. In that view of the matter it is not possible for this Court to accept the aforesaid words of the said witness Chandrakant Manilal at exh.58.

38. The witness has also deposed in para 2 at exh.58 that the terms and conditions referred in letter exh.41 were the terms and conditions which were there in the tender form itself. Ms.Desai has argued that terms and conditions were agreed and, therefore, they were simply required to be put on record and, therefore, the contract is a concluded one.

39. Again, the correspondence on records discloses something else. The respondents have suggested certain terms and conditions and there is nothing on record to show as to whether or not they were finalized. In that view of the matter the terms and conditions incorporated the tender cannot be treated to be final and it cannot be held that the parties had finally agreed with the terms and conditions of the tender form itself.

40. It should be considered that despite the aforesaid letter of the respondents, the appellant never told the respondents that the terms and conditions were already incorporated in the tender form and no other terms and conditions could be considered by the appellant.

41. In para 3 of his cross-examination, the witness has admitted that there is no written resolution of the Committee under which the payment of earnest money by the respondents was waived. He has also admitted that the respondents were required to comply with the condition as tick marked in letter exh.56 and that the respondents had, in fact, not complied with the same. He further says that it is true that none of the conditions of exh.56 were complied with by the respondents.

42. The witness further says that he had knowledge about the dispute raised by the respondents in view of the alleged letter dated 07/3/1972 in respect of the rate of item No.2. The appellant, thus, very well knew the aforesaid dispute about the rate of item No. 2. It is true that the trial Court has found that there was no error committed by the respondents in stating the rate of Rs.3.50 per meter in stead of 3.50 per foot. At the same

time even if there was a wrong dispute, the dispute did stand between the parties and within knowledge of the appellant and, therefore, also it would be difficult to held that there was a concluded contract between the parties as the appellant was not agreeable with the say of the respondents that the rate was wrongly quoted through error.

43. If we turn to the evidence of Chandrakant Manilal Contractor at exh.58 we nowhere find from it that the competent authority had dispensed with the payment of earnest money. There is nothing in his evidence to show that the terms and conditions suggested by the respondents in their correspondence were accepted or that there was some final decision or agreement between the parties with respect to those terms and conditions suggested by the respondents in their correspondence. In absence of such finalization or final decision or final agreement, it could not be said that there was a concluded contract between the parties.

44. No other witness appears to have been examined by the appellant in respect of its case. Therefore, we can safely turn of the evidence of the respondents, Mahendrabhai Babubhai, exh.66, has been examined as dependent witness before the trial Court. He has deposed in very unequivocal terms that he has never paid any earnest money with the tender or thereafter. He has further said that even with respect to the terms and conditions, he was never informed that the conditions are waived by the appellant in his case. He has further stated in his oral evidence before the trial Court, exh.66 that he had never told the appellant that he was agreeable to the terms and conditions as to risk purchase.

45. The witness has been cross-examined on behalf of the appellant and nowhere it was suggested to him that the condition with respect to the payment of earnest money was dispensed with by the appellant at some point of time. It was also not suggested to him that the terms and conditions suggested by the respondents in their correspondence were ultimately finally concluded and there was a final agreement with respect thereto between the parties. Even with respect to the risk purchase, there is no suggestion made to him as to how that condition was finalized between the parties.

46. This means that there is no substantial cross-examination of this witness on aforesaid aspects. Therefore the said evidence of this witness has not at

all been shaken.

47. The material cross-examination of this witness has been restricted to the rates of item No.2. Then there is also cross-examination with respect to other items in the tender which are not relevant for our purpose. Then the third para of cross-examination relates to the letter dated 07/3/1972 said to have been written by the respondents to the appellant clarifying the aforesaid mistake. The trial Court has found that the respondents have failed to prove that this letter dated 07/3/1972 was, in fact, written by the respondents to the appellant. No other cross-examination is found with respect to this witness.

48. Even from the oral testimonies of the parties, it is clear that there is nothing on record to show that the condition with respect to payment of earnest money was dispensed with by the appellant or it could be dispensed with by the appellant. The correspondence between the parties suggests that the payment of earnest money could not be dispensed with and it has not been dispensed with.

49. As stated above, even with respect to other conditions there is nothing on record to show that there was some final agreement between the parties with respect to the terms and conditions proposed by one side to the other. In fact there were proposals and counter proposals made by each party to the opposite party and there is nothing on record to show as to what were the final terms and conditions agreed between the parties. Therefore, when the terms and conditions of contract have not been finalized or when they are not proved to have been finalized then in that event it could not be said to be a concluded contract.

50. Therefore, on the one hand the contract could not be concluded in absence of earnest money on the other hand the contract could not be concluded when the payment of earnest money has not been dispensed with. It is more so when it could not be dispensed with by the appellant. Then it is a matter of record that there were counter proposals suggesting terms and conditions and there is nothing on record to show that some terms and conditions were finally agreed to between the parties. Even from that angle the contract could not be treated to be concluded.

51. The learned counsel for the respondents has relied upon the decision of M/s. Jodiac Electricals Pvt. Ltd. V/s. Union of India, reported in A.I.R. 1986 SC

1918 wherein the Hon'ble Supreme Court has observed that the original offer made by the appellants clearly contained the term that no security deposit would be made by the appellants while the counter-offer made by the DGS & D stipulated in so many terms than a sum of Rs.75,000/will be deposited by the appellants as security deposit. It further observed that the second part of the telegram extending the period for acceptance of the original offer made by the appellants clearly shows that the appellants never intended to send an unqualified acceptance of the counter-offer referred to above. It is also observed that it is undoubtedly true that in the first place of the telegram, the appellants used the expression, "we accept your advance order", but in the context of the second part of the telegram this expression can only mean that the appellants were acknowledging receipt of the advance order which contained the counter-offer. Therefore, it has been observed that the telegram could not be construed as amounting to unconditional acceptance of the counter-offer referred to hereinabove. It is, therefore, held that the original offer contained in the tender submitted by the appellants, the two letters dated 13/8/1979 addressed by the DGS & D to the appellants and the telegram and the confirmatory letter dated 21/8/1979 sent by the appellants to the DGS & D, did not constitute any concluded contract between the parties. Therefore, it has been laid down that the arbitration clause said to be contained in the contract could have no existence and in that event the appellants must succeed in the petition filed by them in the High Court under Section 33 of the Arbitration Act.

52. Therefore, it is clear that when the tender was received by the appellant and when the appellant accepted the same during the course of meeting of the Committee concerned and when the appellant conveyed it to the respondents that the tender was accepted, it could not be said that the contract was concluded. It is more so when the tender of the respondents did not accompany the deposit of earnest money which was a pre-condition. It is more so when there was counter proposal in form of suggestions and there is nothing on record to show that there was some final decision or agreement between the parties with respect to the proposal and counter proposal. It is not on record as to what was an agreement between the parties for risk purchase, payment, interest, deduction etc. unless those terms and conditions were finally concluded, the contract could not treated to be finally concluded.

53. In the aforesaid view of the matter I am of the opinion that the trial Court was not unjustified in holding that there was no concluded contract between the parties. The learned advocate for the appellant arguing the matter at very great length was not in position to convince this Court that the aforesaid finding was against the weight of evidence and, therefore, it was erroneous.

54. In the facts and circumstances of the case it is found that there was no concluded contract between the parties. The appellant could not insist on performance thereof at the hands of the respondents and consequently in absence of a concluded contract the appellant could not allege breach of contract by the respondents. When there was no concluded contract, the respondents were not required to fulfil or perform some part of the alleged contract and simply because the respondents did not perform that part of the contract, it could not be treated to be a breach of contract committed by the respondents when the respondents are not found to have committed breach of contract. When the respondents were not guilty of having committed breach of contract, they would not be responsible and liable to compensate the appellate for the alleged loss caused to it when it purchased item No.2 from the open market.

55. In above view of the matter the judgement and decree of the trial Court refusing decree of the suit amount in favour of the appellant cannot be treated to be illegal and erroneous and, therefore, the same cannot be set aside.

56. Under the aforesaid facts and circumstances of the case this appeal is without any merit and hence deserves to be dismissed. This appeal is, therefore, ordered to be dismissed. The judgement and decree of the trial Court are confirmed. However, looking to the facts and circumstances of the case, there shall be no order as to costs so far as this appeal is concerned.

(D.P. Buch, J)

'Bhavesh'